Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAUL E. SPRAGENS,
Petitioner,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether heightened judicial scrutiny of laws that differentially treat disabled persons is warranted by virtue of Congress' enactment, pursuant to its powers under Section 5 of the Fourteenth Amendment, of the Americans With Disabilities Act of 1990.

2. Whether the federal government's determination to cut off all Social Security disability benefits to most disabled persons earning more than $300 per month, but to allow all blind persons to earn $650 per month before losing benefits, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Paul E. Spragens respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 36 F.3d 947. The opinion of the district court (App., *infra*, 9a-22a) is reported at 808 F. Supp. 1537.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

The provisions of 42 U.S.C. § 423(d)(4), and 20 C.F.R. §§ 404.430(d), 404.1574(b)(2) are reproduced in the Appendix, *infra*, 23a-25a.

STATEMENT

1. Petitioner Paul E. Spragens suffers from arthrogryposis, an irreversible congenital deformity of his joints. This condition has left him with no use of his arms and only limited use of his legs. Because petitioner is unable to walk, he uses a motorized wheelchair for mobility. Despite his severe disability, petitioner works as a freelance indexer of books by typing with his toes on a computer keyboard. App., *infra*, 1a, 9a.

2. Disabled persons such as petitioner are eligible for disability benefits under the Social Security Act (the Act). 42 U.S.C. § 423(a)(1)(A), (D). Persons capable of "substantial gainful activity," however, are deemed not disabled and are therefore ineligible for benefits. 42 U.S.C. § 423(d)(4). Petitioner began to receive Social Security disability benefits in 1976 following the death of his father. However, in 1988, pursuant to a periodic disability review, the Social Security Administration (SSA) determined that petitioner had been engaged in substantial gainful activity and informed him that he was no longer eligible for benefits. The SSA's action was based upon a finding that petitioner's average net monthly earnings during 1986 were $349.26. Under SSA regulations, a person who earned more than $300 per month during 1986 is deemed to have engaged in substantial gainful activity. 20 C.F.R. § 404.1574(b)(2)(vi). App., *infra*, 2a, 10a.

The SSA's determination was accompanied by a demand that petitioner return $19,930 in benefits paid to

him between 1986 and 1989. C.A. App. 115. The determination was upheld upon reconsideration and, following a hearing, was confirmed in a decision by an Administrative Law Judge (ALJ). The Appeals Council declined petitioner's request for review of the ALJ's decision, making the ALJ's decision the final administrative decision of the SSA. App., *infra*, 2a, 10a.

Throughout these administrative proceedings, petitioner did not contest the fact that he earned $349 per month during 1986. Nor does he now. Instead, petitioner challenged the termination of his benefits on the ground that his benefits would not have been terminated had his disability been blindness rather than arthrogryposis. In 1986, a person disabled by blindness could earn up to $650 per month and remain eligible for disability benefits. 42 U.S.C. § 423(d)(4); 20 C.F.R. § 404.430(d)(ix). Under 42 U.S.C. § 423(d)(4), "[n]o individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed the exempt amount under section 403(f)(8) of this title which is applicable to individuals described in subparagraph (D) thereof." The referenced provision, Section 403(f)(8)(D), applies a monthly earnings limitation to the receipt of retirement benefits by the elderly. In 1986, that limit was $650 per month. 20 C.F.R. § 404.430(d)(ix). The resulting preference for the blind over all other persons, no matter how severe their disability, remains in place today.[1] App., *infra*, 2a, 14a-15a.

The ALJ refused even to consider petitioner's objection[2] to the preference, saying that it was "a

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[1] The earnings threshold for nonblind disabled persons for years after 1989 is $500 per month. 20 C.F.R. § 404.1574(b)(2)(vii). The earnings threshold for the blind in 1990 (the last year for which the Code of Federal Regulations gives a figure) is $780 per month. 20 C.F.R. § 404.430(d)(xiii).

[2] In a letter responding to the SSA's notification that his benefits would cease, petitioner wrote "[t]he blind are eligible to receive SSDI benefits as long as their net monthly earning don't exceed

constitutional argument which is inappropriate for this administrative forum. * * * [I]f [petitioner] wishe[s] to pursue his issues regarding discrimination he should appeal to a United States District Court or should take up the matter with his congressional delegation." C.A. App. 46. The Appeals Council likewise stated that "[t]he distinction between the blind and other disabled individuals was promulgated by Congress, when it enacted the disability provisions of the Social Security Act. It can only be changed by revision of the law or invalidation by the courts." C.A. App. 41.

3. Petitioner then filed suit in the United States District Court for the District of Wyoming, arguing that 42 U.S.C. § 423(d)(4) and its implementing regulations violate the equal protection component of the Due Process Clause of the Fifth Amendment. In his motion for summary judgment, which he filed *pro se*, petitioner argued (C.A. App. 23-24B):

> Arthrogryposis cannot rationally be distinguished from blindness in this context. Like blindness, arthrogryposis is also a permanent and irreversible condition.
>
> * * *
>
> With respect to the distribution of disability benefits, a blind person and a person with

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$650 (for 1986) or $680 (for 1987). What is the basis for discriminating between a permanent and irreversible disability affecting the eyes and a permanent and irreversible disability affecting limbs and joints (as in my case)?" C.A. App. 118-119.

In a second letter to the SSA, petitioner stated "your rules defining 'substantial gainful activity' discriminate unfairly against me, because they allow a blind person to earn more than twice as much as me without losing benefits. * * * [It] is impossible to justify * * * establishing distinctions among people with permanent disabilities when deciding what constitutes 'substantial gainful activity.' Like a blind person, I am permanently disabled: my condition, arthrogryposis, affects my limbs and joints. * * * It is on this concept of fairness that I am fundamentally basing my appeal." C.A. App. 111.

> arthrogryposis are similarly situated and thus entitled to equal protection. The relative capabilities of a blind person and a quadriplegic with arthrogryposis to engage in substantial gainful activity, and thus escape the impoverishment that Social Security disability benefits are designed to remedy, cannot be distinguished without the aid of an arbitrary classification. Either person must overcome obstacles to secure and hold employment. In overcoming the loss of sight, a blind person can use braille and computers as tools, and a seeing eye dog to assist with mobility. I can use a motorized wheelchair to compensate partially for my inability to walk. A computer assists me in my work and renders the relative disadvantage I have in manipulating, moving, and lifting objects with my feet instead of my hands less a disadvantage.
>
> * * *
>
> The distinction between blind persons and quadriplegics with arthrogryposis has no rational relationship to the purpose of the Social Security Act's disability insurance program. No characteristic distinguishes them from me that are relevant to the payment of disability benefits or the definition of substantial gainful activity. Therefore, this provision of the Social Security Act, as applied to me, denies me equal protection.

The government, in response, defended the legislation on the theory that Congress might nevertheless have reasonably determined that blind persons have greater difficulty finding employment. App., *infra*, 17a-18a. The district court thereafter agreed with petitioner and held that the SSA's laws and regulations, as applied to petitioner, were unconstitutional. *Id.* at 21a. While acknowledging that in the context of social welfare legislation, equal protection ordinarily requires only that a challenged classification be rationally related to a legitimate governmental interest, the district court concluded that a case concerning unequal treatment of a

disabled person requires "a more exacting" review. *Id.* at 17a. Applying that review, and after considering the possible purposes of the preference for the blind, the court held that the law as applied to petitioner was "arbitrary and discriminatory" and did not have "a fair and substantial relationship to the object of the legislation." *Id.* at 21a (internal quotation marks and citations omitted). The Court therefore granted judgment in favor of petitioner. *Id.* at 21a-22a.

4. The United States Court of Appeals for the Tenth Circuit reversed. App., *infra*, 1a-8a. That Court first rejected the district court's conclusion that the laws and regulations at issue here were subject to some form of heightened scrutiny and held instead that the rational basis test was the proper standard of review. App., *infra*, 5a. Applying that test, the Tenth Circuit upheld the preference for the blind, stating that "it is reasonable to conclude that blind persons are in a less favorable position than others who, though suffering from disabilities, nonetheless still have their eyesight." App., *infra*, 6a-7a.

REASONS FOR GRANTING THE PETITION

Review of the Tenth Circuit's decision in this case is warranted for several reasons. First, this Court should grant certiorari to assess the effect of the Americans With Disabilities Act on the appropriate standard of review for cases involving legal classifications based on disability. Second, the lower federal courts are in conflict over the appropriate standard of review for such cases. Those courts are also divided on the question whether preferences for the blind in the award of disability benefits violate equal protection principles. The Court should grant review to resolve these conflicts. Third, the questions presented by this case are of considerable importance to millions of disabled persons. Fourth, the lower court's judgment in this case is directly at odds with the strong and growing national consensus that persons able to work should not be discouraged

from doing so by the operation of governmental programs. Finally, whatever standard of review is appropriate for this case, the decision of the Tenth Circuit is plainly wrong and is in conflict with this Court's precedents.

1. On two occasions, this Court has given consideration to the proper standard of review to apply to classifications drawn on the basis of disability. In *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the Court considered a city ordinance requiring a proposed group home for the mentally retarded to obtain a special use permit. Stating that "absent controlling congressional direction," *id.* at 439, it could not conclude that the mentally retarded are even a "quasi-suspect classification," *id.* at 442, the Court applied what it said was the rational basis test and held that the ordinance was invalid as applied in that case. See *id.* at 447-450.

More recently, in *Heller* v. *Doe*, 113 S. Ct. 2637 (1993), this Court upheld, under a deferential version of the rational basis test, Kentucky's statutes allowing for the involuntary commitment of the mentally retarded. The respondent in *Heller* (who represented a class of involuntarily committed mentally retarded individuals) argued that, notwithstanding *Cleburne*, Kentucky's statutes should be subjected to heightened scrutiny because of the passage of the ADA. See Brief for Respondent 29 ("Congress, in enacting the ADA, has indicated that all individuals with disabilities * * * should be treated as a suspect class."); see also *Heller* v. *Doe*, 113 S. Ct. at 2651 n.1 (Souter, J., dissenting). The Court did not reject the argument, but instead noted that it had not been properly preserved in the case. See 113 S. Ct. at 2642.

The ADA argument *has* been properly preserved in this case, and it is a powerful one this Court should

consider.[3] In the ADA, Congress made an express finding that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(a)(7). This finding, which tracks the language of this Court's decisions identifying the characteristics of a suspect classification,[4] is at the very least a clear "Congressional endorsement of the idea that classifications which disadvantage people with disabilities should be subjected to heightened judicial scrutiny under the equal protection clause." Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 436 (1991). In fact, the implications of the ADA go much further than that. Because the ADA was expressly enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment to enforce equal protection principles, see 42 U.S.C. § 12101(b)(4), the ADA should

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[3] Petitioner argued in the courts below that heightened scrutiny should apply, see Gov't C.A. Reply Br. 1 ("[Petitioner] argues that the statute in this case is subject to a heightened standard of review."); C.A. App. 24A. He also cited the ADA in support of that argument. See Pet. C.A. Br. 13-15. Both lower courts, moreover, considered the question whether heightened scrutiny should apply. App., *infra*, 5a-6a, 15a-17a.

[4] See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971); *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

be seen as a directive to the judiciary to apply heightened scrutiny to laws that differentially treat the disabled. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); Amy Scott Lowndes, Note, *The Americans With Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 Fla. L. Rev. 417 (1992). For in enacting the ADA, "Congress clearly intended to create a new protected class -- the disabled." Lowndes, *supra*, at 446. That enactment, therefore, is the "controlling congressional direction" that was missing in *Cleburne*.

This proposition is further confirmed by this Court's analysis in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). In that case, the Court held that sex-based classifications are subject to heightened scrutiny and, in reaching this conclusion, the Court relied in part upon Congress' adoption of two major pieces of legislation barring sex discrimination -- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) -- and Congress' recent ratification of the Equal Rights Amendment. 411 U.S. at 687 (plurality opinion of Brennan, J.). Pointing to these measures, Justice Brennan stated that "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." *Id.* at 687-688, citing *Katzenbach* v. *Morgan, supra,* and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Similarly, the ADA should inform judicial review of laws that differentially treat the disabled. This is a matter that should be addressed by this Court.

This case presents a perfect vehicle for doing so,[5] for here, relying on pre-ADA jurisprudence, the Tenth

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[5] Under this Court's cases, the argument for heightened scrutiny in this case is in no way undermined by the fact that 42 U.S.C. § 423(d)(4) distinguishes not between the disabled and the nondisabled, but between two subclasses of disabled persons. See *Nyquist v. Mauclet*, 432 U.S. 1, 8 (1977) (applying strict scrutiny

Circuit expressly rejected the district court's application of a "more exacting standard" and instead judged the preference for the blind under the rational basis test. App., *infra*, 5a-6a.[6]

2. Review of the decision below is also warranted to resolve the conflicts and dispel the confusion that now exists among the lower federal courts concerning the standard of review applicable to disability classifications. In the wake of the ADA, at least one federal court has held, and several others have assumed, that laws that classify persons according to disability "are therefore subject at least to intermediate heightened scrutiny based on Congress' findings in § 12101 [of the ADA]." *Martin* v. *Voinovich*, 840 F. Supp. 1175, 1210 (S.D. Ohio 1993). See also *Crowder* v. *Kitagawa*, 842 F. Supp. 1257, 1264 (D. Haw. 1994) (assuming arguendo in light of the ADA that heightened scrutiny now applies to disability classifications); *Ohio Council of the Blind* v. *Voinovich*, No. C2-93-528, 1994 WL

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to a state law that discriminated "within the class of aliens" in the award of student aid); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636, 637 (1974) (invalidating on equal protection grounds a provision of the Social Security Act that discriminated between "two subclasses" of illegitimate children in the award of benefits); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169 (1972) (invalidating a state law that similarly discriminated between illegitimate children). Closer scrutiny of disability classifications is warranted not just because they may result from invidious animus, but also because they are often the product "of thoughtlessness and indifference -- of benign neglect." *Alexander* v. *Choate*, 469 U.S. 287, 295 (1985); see also Laurence H. Tribe, *American Constitutional Law* § 16-31, at 1597 (2d ed. 1988) (the history of "legislative blindness" toward the disabled "justifies the exercise of heightened judicial scrutiny"). Therefore, laws that divide disabled persons into separate categories on a seemingly arbitrary basis are just as deserving of close judicial scrutiny as laws that distinguish between the disabled and the nondisabled.

[6] Although the Tenth Circuit did say in dicta that "regardless of the standard used, the result in the instant case would, in our view, be the same," App., *infra*, 6a, it is perfectly clear that the court engaged only in rational-basis review.

504405, *8 (S.D. Ohio Mar. 28, 1994) ("Whether handicapped persons are treated as a 'suspect class' entitled to at least intermediate, if not strict, scrutiny under the equal protection clause also appears to be an open question."); *Trautz* v. *Weisman*, 819 F. Supp. 282, 293-294 (S.D.N.Y. 1993) (holding, in light of the ADA, that the disabled are a protected class for purposes of 42 U.S.C. § 1985(3)). Other courts, however, have taken the opposite view of the effect of the ADA. See *Contractors Ass'n of Eastern Pennsylvania, Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1001 (3d Cir. 1993) ("We disagree * * * that the ADA overruled *Cleburne*"); *More* v. *Farrier*, 984 F.2d 269, 271 n.4 (8th Cir.) (the ADA does not "alter the standard for constitutional equal protection claims"), *cert. denied,* 114 S. Ct. 74 (1993).

The lower federal courts are also divided over the meaning of the Court's decision in *Cleburne*. Although the Court in *Cleburne* said that it was applying the rational basis test, the Court's mode of analysis, as Justice Marshall pointed out, was actually "the sort of probing inquiry associated with heightened scrutiny." 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part). In particular, the Court's opinion went beyond ordinary rational basis review when it held (*id.* at 450) that the "record" did not support the discriminatory classification at issue. As Justice Marshall observed, "under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation." *Id.* at 458. Justice Marshall predicted that by engaging in "second order" rational-basis review while ostensibly applying "ordinary" rational-basis review the Court would leave lower courts "in the dark." *Id.* at 460. Justice Marshall's prediction has come to pass.

While some courts have held on the basis of *Cleburne* that disability classifications should receive nothing more than ordinary rational basis review, see, *e.g.*, *Disabled American Veterans* v. *United States Dep't of Veterans Affairs*, 962 F.2d 136, 142 (2d Cir. 1992);

Lussier v. *Dugger*, 904 F.2d 661, 671 (11th Cir. 1990), at least one circuit has construed *Cleburne* to license what it calls "active" rational basis review -- a test under which the government must establish "on the record" a rational basis for the challenged classification. *See Pruitt* v. *Cheney*, 963 F.2d 1160, 1165-1166 (9th Cir.), *cert. denied,* 113 S. Ct. 655 (1992); *High Tech Gays* v. *Defense Indus. Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990). Still other courts, owing to the confusion, have avoided the question by assuming arguendo that heightened scrutiny applies. See, *e.g., Story* v. *Green*, 978 F.2d 60, 64 (2d Cir. 1992); *Leckelt* v. *Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 832 (5th Cir. 1990); *Brennan* v. *Stewart*, 834 F.2d 1248, 1258 (5th Cir. 1988). In *Brennan* v. *Stewart*, for example, the Fifth Circuit stated that it would assume that its review of disability-based classifications "is somewhat closer than usual" because the rational basis test used in *Cleburne* "cannot be reconciled with the extreme deference usually accorded under that rubric." 834 F.2d at 1258.

The Court's recent decision in *Heller* v. *Doe* only added to the confusion caused by *Cleburne*. In *Heller*, the Court ignored *Cleburne* and employed ordinary rational basis test to judge a classification drawn on the basis of mental retardation. The Court did not reject *Cleburne*, however, but rather said that the *Cleburne* Court did not "purport" to apply a different standard. 113 S. Ct. at 2643. Justice Souter therefore pointed out that a *Cleburne* analysis would have entailed "enquiring into record support for the State's proffered justifications, and examining the distinction in treatment in light of the purposes put forward to support it." 113 S. Ct. at 2652 (Souter, J., dissenting). He then concluded that "[w]hile the Court cites *Cleburne* once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day *Cleburne*'s status is left uncertain. I would follow *Cleburne* here." *Id.*

Finally, the courts are also divided on the ultimate merits of the question presented here -- whether preferences for the blind in the award of government benefits for the disabled violate equal protection principles. In *McGuire* v. *Switzer*, 734 F. Supp. 99 (S.D.N.Y. 1990), plaintiff was a paraplegic who participated in a state-run, federally-funded program that reimbursed the educational expenses of disabled students. He challenged on equal protection grounds new regulations that placed a cap on the amount of expenses that could be reimbursed under the program, arguing that, under a parallel program for which only visually-disabled students were eligible, the cap was set at a higher level. See *id.* at 113-114. Noting that in the Rehabilitation Act, 29 U.S.C. § 706(15)(A)(iii), "Congress has classified both blindness and paraplegia, plaintiff's condition, as severe handicaps," the court reasoned that "visually-disabled individuals are similarly situated to those individuals as severely disabled as plaintiff." *Id.* at 113. Accordingly, the court held that "the defendants have failed to establish that the state has a rational basis for" its "disparate treatment of [the plaintiff] vis-a-vis the state's treatment of eligible visually-disabled individuals." *Id.* at 113, 115.

McGuire is in square conflict with the decision below. In each case, a government program awarded greater benefits to needy blind persons than to other needy disabled persons. But whereas the *McGuire* court concluded that such disparate treatment violated equal protection principles, the Tenth Circuit did not.

In sum, because of the passage of the ADA, because of confusion over the appropriate application of *Cleburne*, and because of the differing views over the constitutionality of preferences for one disabled class over another, this Court should grant review to clarify the law in this important area.

3. The law in this area is important if for no other reason than it affects millions of disabled persons. In enacting the ADA, Congress found that 43 million

Americans have one or more physical or mental disabilities. See 42 U.S.C. § 12101(a)(1). At stake in this case, then, is the standard by which the constitutionality of the many federal, state, and local laws affecting these people should be judged. It is crucial that this standard be clarified where, as here, the result of the law's application is to cut off all benefits to people in great need.

Furthermore, the particular laws and regulations directly at issue in this case are themselves of direct consequence to millions of disabled people. By the government's own admission, approximately three million people receive Social Security disability benefits. See Gov't C.A. Reply Br. 3 & n.1. It is indisputable that these benefits are of great importance to those who receive them. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). And in petitioner's own case, they were indispensable, since he not only lost *all* of his disability benefits, but also has been asked to return more than $19,000 in past benefits paid as long as eight years ago. The constitutionality of the laws and regulations at issue here is therefore worthy of this Court's close scrutiny. Cf. *Medora* v. *Colautti*, 602 F.2d 1149, 1154 (3d Cir. 1979); *LaMadrid* v. *Hegstrom*, 599 F. Supp. 1450, 1458 (D. Ore. 1984), *aff'd in part and rev'd in part*, 830 F.2d 1524 (9th Cir. 1987).

4. The decision below also warrants further review because the preference for the blind upheld by the Tenth Circuit results in a scheme that is fundamentally at odds with the national consensus that the government should encourage work over idleness. In 1986, the earnings limitation applicable to nonblind disabled persons was $300 per month, or $3,600 per annum. The earnings limitation applicable to blind persons that same year was $650 per month, or $7,800 per annum. In 1986, petitioner was paid $6,072 in Social Security benefits. C.A. App. 120. The SSA determined, however, that petitioner was not eligible for and should not have received those 1986 benefits because he earned $4,191

through gainful employment that year. Therefore, by earning more than the $3,600 limit, petitioner rendered himself ineligible for $6,072 in benefits -- making it economically senseless for petitioner to obtain work he was capable of performing. In contrast, the blind in 1986 could earn more than twice as much -- $7,800 -- as nonblind disabled persons without losing benefits. Therefore, a blind person capable of earning the amount of money that petitioner earned in 1986 ($4,191) would not have had a disincentive to work to his fullest. In short, the scheme upheld by the Tenth Circuit actually gives all disabled persons -- other than the blind -- a financial incentive not to work. As petitioner himself put it in a letter addressed to the SSA, the rule "discriminates unfairly, rewards indolence, and undermines the family." C.A. App. 119.

5. Finally, no matter which standard of review should have been applied in this case, the Tenth Circuit was wrong to uphold the laws and regulations at issue here because they cannot survive under *any standard* approved by this Court. The rational basis test requires a legislatively-drawn classification "be rationally related to a legitimate government purpose." *Cleburne*, 473 U.S. at 446. Although deferential, this "standard of rationality * * * must find some footing in the realities of the subject addressed by the legislation." *Heller* v. *Doe*, 113 S. Ct. at 2643. When that footing is absent, this Court does not hesitate to invalidate legislation. See, *e.g.*, *Zobel* v. *Williams*, 457 U.S. 55 (1982); *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973). The rational basis test, then, "is not a toothless one." *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976).

The Tenth Circuit's entire explanation for its decision to uphold the preference for the blind was the following conclusory statement:

> In our view, it is reasonable to conclude that blind persons are in a less favorable position than others who, though suffering from disabilities, nonetheless still have their eyesight. And the fact, if it is a fact,

> that [petitioner] may have "more disability" than *some* blind persons does not change the result. See *Mathews* v. *De Castro*, [429 U.S. 181 (1976)]. A classification scheme of this sort does not have to be perfect.

App., *infra*, 6a-7a (emphasis in the original). The shortcomings of this "analysis" are manifest. First, the court did not explain what it is that the blind are in "a less favorable position" with respect to, or why it is reasonable to conclude that they are in that less favorable position. Second, even if the blind do occupy a "less favorable position," the court did not explain how the laws and regulations at issue here are *rationally related* to the amelioration of that condition. Third, and perhaps most fundamentally, the Tenth Circuit plainly erred by disposing of petitioner's challenge as if it were a facial rather than an as applied challenge.[7] The district court's holding was that "42 U.S.C. § 423(d)(4), *as applied to [petitioner]*, violates the equal protection component of the Fifth Amendment." App., *infra*, 21a (emphasis added).[8] The Tenth Circuit, however, upheld the statute as if it had been attacked on its face; this is clear from the court's statement quoted above and the case it cited -- *Mathews* v. *De Castro* -- which involved a facial challenge. See 429 U.S. at 184.

It is quite clear, however, that, as applied to petitioner, the laws and regulations at issue here are irrational. Like blindness, petitioner's condition -- arthrogryposis -- is a permanent, irreversible, and severe disability. Indeed,

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[7] A law which is valid on its face may nonetheless be irrational as applied in a particular case. *See, e.g., Cleburne*, 473 U.S. at 447-450; *Bannum, Inc.* v. *City of Louisville*, 958 F.2d 1354, 1358 (6th Cir. 1992); see also *Carolene Products*, 304 U.S. at 153-154; cf. *Cleburne Living Ctr., Inc.* v. *City of Cleburne*, 726 F.2d 191, 200 (5th Cir. 1984) (invalidating ordinance on its face and as applied), *aff'd in part and vacated in part*, 473 U.S. 432 (1985).

[8] In his motion for summary judgment, petitioner argued that "this provision of the Social Security Act, as applied to me, denies me equal protection." C.A. App. 24B.

the Rehabilitation Act classifies both blindness and quadriplegia (a term descriptive of petitioner's condition) as "severe disabilit[ies]." 29 U.S.C. § 706(15)(A)(iii). Furthermore, both blindness and petitioner's disability obviously make it very difficult to find employment. In all relevant respects, then, petitioner and the blind are similarly situated. See *McGuire* v. *Switzer*, *supra*. Because the core command of the Equal Protection Clause is that government must treat similarly situated persons alike, see, *e.g.*, *Cleburne*, 473 U.S. at 439; *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982), the laws and regulations at issue here are therefore unconstitutional as applied to petitioner.

Nor is the discrimination against petitioner capable of weathering even a facial challenge to its constitutionality. The purpose of the statute at issue is readily apparent from its legislative history: It was Congress' intent "to remove disincentives to gainful activity, and to encourage every person to seek work, to contribute, and to become independent." 123 Cong. Rec. 37,140 (1977) (statement of Sen. Bayh).[9] It surely is rational to give the disabled a financial incentive to choose industry over idleness. Yet it is just as surely irrational to give this incentive only to some seriously disabled persons.[10]

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[9] See also 123 Cong. Rec. 37,140-41 (1977) (statements of Sen. Humphrey & Durkin); 123 Cong. Rec. 4,815-16 (1977) (statements of Sen. Humphrey & Sen. Bayh). The government throughout this case has defended the rationality of the preference for the blind with reference to the purposes expressed in this legislative history. *See* Gov't C.A. Br. 11, 21-23. The government, moreover, has introduced into the record no evidence other than the legislative history.

[10] The principle that when government tackles social problems it "may take one step at a time," *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955), is wholly inapplicable in this case. In raising the earnings limit for the blind, Congress deliberately decided not to do the same for other disabled persons. "The conferees are aware that this [legislation] establishes a different test of SGA [substantial gainful activity] for blind persons than is applied administratively for persons with other

Those persons with a serious disability other than blindness face the same dilemma between earning a living and losing benefits that the blind do. The purpose of the legislation, therefore, cannot possibly be furthered by cutting off benefits to persons in petitioner's position.[11]

In the courts below, the government argued (see Gov't C.A. Br. 21-23) that the preference for the blind was rational because Congress could plausibly conclude that the blind face greater employment problems than other disabled persons. See, *e.g.*, 123 Cong. Rec. 39,032 (1977) (statement of Rep. Bingham) ("We feel blind persons experience greater ongoing financial problems in seeking permanent employment than other disabled individuals, which require special consideration."). There are two complete answers to this argument. First, the idea that the blind face greater difficulties finding employment than other disabled persons simply finds no "footing in the realities of the subject." *Heller* v. *Doe*,

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disabilities. The conferees do not intend that the new SGA level established for the blind should be applied to other types of disability." H.R. Rep. No. 95-702(II), 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4155, 4319. The "one step at a time" principle cannot apply where it is not plausible to suppose that Congress plans to take any further steps. Here, the preference for the blind was put in place in 1977 and Congress has shown no inclination since then to put other disabled persons on a par with the blind.

[11]In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), this Court identified a quite similar flaw in an argument advanced in defense of a Pennsylvania law requiring new state residents to wait for one year before receiving welfare benefits:

> Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. *A state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only.*

Id. at 637-638 (emphasis added). See also *Jimenez v. Weinberger*, 417 U.S. at 636-637.

113 S. Ct. at 2643. It is true that, by way of statistical support for the legislation, Senator Bayh pointed out that there is "a dramatic 70 percent rate of unemployment and underemployment" among the blind; but he then went on to say that "[a]ny group with such a high rate merits being singled out for compensatory help, for particular assistance to meet their problems." 123 Cong. Rec. 37,139 (1977). The fact is that the rate of unemployment for *all* disabled persons closely approximates the rate for the blind cited by Senator Bayh. See H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314 ("Two-thirds of all disabled Americans between the ages of 16 and 64 are not working at all."); 56 Fed. Reg. 8578, 8581 (1991) (same); Burgdorf, *supra*, at 420 (same); Louis Harris & Assocs., Inc., *N.O.D./Harris Survey of Americans With Disabilities* 7 (1994) (same); see also Jerry L. Mashaw, *Against First Principles*, 31 San Diego L. Rev. 211, 236 (1994) ("[T]he unemployment [rate] for the handicapped in the United States is estimated at 75% to 80% and drops down to about 50% only in times of very full employment."). Congress thus could not have reasonably concluded that the blind are more economically challenged than other severely disabled persons.

Finally, and in any event, even if it were true that the blind do have greater difficulty finding jobs than other disabled persons, the preference enacted by Congress would still be irrational. This is because the preference does *nothing* to aid those blind persons who are unable to find work. Under the scheme created by 42 U.S.C. § 423(d)(4), those blind persons who earn less than $300 per month are treated no differently than other disabled persons who earn less than $300 per month. Similarly, those blind persons who earn more than $650 per month are treated no differently than other disabled persons who earn more than $650 per month. Therefore, the benefit of the policy, such as it is, is felt entirely and only by those blind persons who earn between $300 and

$650 per month. It is necessarily the case, however, that every blind person who fits that description is *already employed*. Therefore, even if the blind do face unique obstacles to employment, 42 U.S.C. § 423(d)(4) does nothing to remove them. Instead, its only effect is to punish severely disabled persons such as petitioner who sought to earn a living notwithstanding their disability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

No. 93-8067

Paul E. SPRAGENS, Plaintiff-Appellee,

v.

Donna E. SHALALA, Secretary of
Health and Human Services, Defendant-Appellant

Sept. 22, 1994

Before MOORE, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and ROSZKOWSKI, Senior District Judge.*

McWILLIAMS, Senior Circuit Judge:

This is a Social Security case involving a constitutional challenge to a federal statute and administrative regulations promulgated pursuant thereto.

Paul E. Spragens suffers from arthrogryposis[1] and because of that condition he has received for many years disability and disability insurance benefits under the Social Security Act. 42 U.S.C. §§ 401-33 (1988 & Supp. 1992). Following periodic disability review, the Social Security Administration in September, 1988, found that from January, 1986, through December, 1986, Spragens' average net earnings from independent self-

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* Honorable Stanley J. Roszkowski, Senior District Judge, Northern District of Illinois, sitting by designation.

[1] Arthrogryposis is an irreversible and non-progressive congenital deformity of the joints. The disease has left Spragens with no use of his arms and limited use of his legs. He uses a motorized wheelchair for mobility. Despite the severity of his disability, Spragens is able to type on a computer keyboard with his toes, and works as a self-employed indexer of books.

employment were $349.26 per month. At that point in time the applicable regulation provided that a person who had net earnings of at least $300 per month was engaged in "substantial gainful activity" and because of that was no longer eligible for Social Security benefits, regardless of his or her physical condition. 42 U.S.C. § 423(d)(4) (1988); 20 CFR 404.1574(b)(2)(vi). Accordingly, Spragens' Social Security benefits ceased.

Spragens sought, and obtained, review by an Administrative Law Judge (ALJ). At the hearing Spragens did not challenge the administrative ruling that because he received $300 or more per month from his independent self-employment he was no longer eligible for Social Security benefits under the then existing rules and regulations. He attempted to challenge before the ALJ, however, the $300 figure on the basis that he was denied his equal protection rights, because by separate regulation blind persons were allowed to receive $650 net earnings per month before he, or she, became ineligible for Social Security benefits. 42 U.S.C. § 423(d)(4); 42 U.S.C. § 403(f)(8)(D); 20 CFR 404.430(d)(ix); 20 CFR 404.1584(d).

The ALJ upheld the administrative ruling that because Spragens received more than $300 net earnings per month he was no longer eligible for any Social Security benefits. The ALJ declined to address Spragens' constitutional challenge to the $300 limitation. On review, the Appeals Council affirmed the ALJ.

Spragens then brought the present actin in the United States District Court for the District of Wyoming. Spragens' basic position was that because of the $300 per month limitation placed on his allowable net earnings from independent self-employment, as contrasted with the $650 per month limitation afforded blind persons, he was denied equal protection. Spragens did not contest the action of the Secretary in holding that under the law as it then existed, he was no longer

eligible for Social Security benefits since his net earnings were more than $300 per month.

The Secretary moved to affirm the Appeals Council. Spragens moved from summary judgment on that part of his complaint which challenged the constitutionality of the $300 per month limitation. After hearing, the district court granted the Secretary's motion to affirm the administrative decision that because he had net earnings of more than $300 per month, Spragens was no longer entitled to Social Security benefits, "regardless of the severity of his impairments."

At the same time, the district court went on to consider Spragens' equal protection argument. The district court ruled in favor of Spragens on his equal protection argument and concluded that granting blind persons the right to receive $650 net earnings per month before losing Social Security benefits, as opposed to granting one situated as is Spragens only $300 net earnings per month before losing his Social Security benefits, was "arbitrary and discriminatory" and that the $650 per month figure granted blind persons did not have "a fair and substantial relationship to the object of the legislation."

Accordingly, the district court held that 42 U.S.C. § 423(d)(4), and the regulations issued pursuant thereto, as applied to Spragens, violated the equal protection component of the Fifth Amendment.[2] For relief, the district court ordered the Secretary "to reinstate Spragens' eligibility to receive disability benefits," and the court further decreed that Spragens did not owe the Social Security Administration any amount for alleged overpayment. *See Spragens v. Secretary of Health &*

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[2] It is well established that the Due Process Clause of the Fifth Amendment "encompasses equal protection principles" *Mathews v. De Castro*, 429 U.S. 181, 182 n. 1, 97 S.Ct. 431, 432 n. 1, 50 L.Ed.2d 389 (1976).

human Servs., 808 F.Supp. 1537 (D.Wyo.1992). The Secretary now appeals.

Spragens' position in this Court, as it was in the district court, is that because a blind person, under applicable statute and regulations, is permitted to receive $650 net earnings per month before he, or she, become ineligible for Social Security benefits, whereas he may only receive $300 net earnings per month before he becomes ineligible for Social Security benefits, he has been denied equal protection of the laws. The obvious "reverse side" of this argument is that if blind persons were not allowed by statute and regulations to receive $650 net earnings per month before becoming ineligible for Social Security benefits, and were only allowed $300 net earnings per month, Spragens would have no equal protection argument.

Mathews v. De Castro, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) involved a constitutional challenge based on Fifth Amendment due process rights to Social Security regulations which, according to the plaintiff in that action, violated her equal protection rights in that they favored a *married* woman under 62 years of age who had minor children and whose husband retired or became disabled as contrasted with a divorced woman whose ex-husband retired but who was otherwise similarly situated as was the married woman. More will be said about the details of that case later. At this point, we would simply quote from that opinion concerning the general principles to be followed in considering Spragens' argument in this Court:

> The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is

> clearly wrong, a display of arbitrary power, not an exercise of judgment," *Helvering v. Davis*, 301 U.S. 619, 640 [57 S.Ct. 904, 908, 81 L.Ed. 1307 (1937)]. In enacting legislation of this kind a government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485 [90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970)].
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> To be sure, the standard by which legislation such as this must be judged "is not a toothless one," *Mathews v. Lucas*, 427 U.S. 495, 510 [96 S.Ct. 2755, 2764, 49 L.Ed.2d 651 (1976)]. But the challenged statute is entitled to a strong presumption of constitutionality. "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 [92 S.Ct. 1724, 1731, 32 L.Ed.2d 285 (1972)]. It is with this principle in mind that we consider the specific constitutional issue presented by this litigation.

Mathews v. *De Castro,* 429 U.S. at 185, 97 S.Ct. at 434.

In the instant case, the district court concluded that the traditional "rational basis" test between the 'challenged classification" and the "legitimate government interest" was not the proper standard and that a more exacting standard should be used since Spragens was severely disabled and was going to lose all Social Security benefits. We disagree and hold that the "rational basis" test is the proper standard for review. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In *Cleburne* the Supreme Court held that mentally retarded persons were not even a "quasi-suspect class," and that accordingly, a stricter

scrutiny than "rational basis" was not required. *Id.* at 446, 105 S.Ct. at 3257-58. In our view, a classification applying to blind persons is not suspect, or even quasi-suspect, and we therefore apply the "rational basis" standard, rather than some more strict one, to the instant case. All of which may be academic in a sense, since, regardless of the standard used, the result in the instant case would, in our view, be the same.

Is there a rational relationship between granting a blind person, but not granting a non-blind person who is otherwise disabled, a preference by allowing him, or her, to receive $650 net earnings per month before becoming ineligible for Social Security benefits, whereas the non-blind disabled person is only granted $300 net earnings per month before becoming ineligible for Social Security benefits? We think there is a reasonable basis therefor.[3] In our view, it is reasonable to conclude that blind persons are in a less favorable position than others who, though suffering from disabilities, nonetheless still have their eyesight. And the fact, if it is a fact, that Spragens may have "more disability" than *some* blind persons does not change the result. *See Mathews v. De Castro, supra.* A classification scheme of this sort does not have to be perfect.

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[3] While the rational basis standard still required "some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, --- U.S. ---, ---, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993), the statute should be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, --- U.S. ---, ---, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). The legislature is not under an obligation to produce evidence that its classification is reasonable, and indeed the classification may be based on "rational speculation unsupported by evidence or empirical data." *Id.* at ---, 113 S.Ct. at 2102. Legislation which confers monetary benefits is accorded a strong presumption of validity, because "Congress should have discretion in deciding how to expend necessarily limited resources." *Schweiker v.*

In support of our resolution of this matter, *see, e.g., Mathews v. De Castro, supra,* and *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n,* 889 F.2d 929 (10th Cir.1989).

In *Mathews* there was a Fifth Amendment due process challenge to Social Security regulations which granted benefits to a *married* woman under 62 whose husband retired or became disabled, if she had a minor or other dependent child, but did *not* grant similar benefits to a divorced woman who was also under 62 and had a young or disabled child in her care when her ex-husband retired or became disabled. In rejecting a divorced woman's constitutional challenge to these regulations the Supreme Court applied the "rational basis" test and concluded that it was not "irrational" for Congress to recognize that "divorce couples typically live separate lies" and that such could be considered in deciding not to grant divorced women under 62 benefits when their ex-husband retires or becomes disabled, and further, that Congress could "rationally decide that the problems created for divorced women remained less pressing than those faced by women who continue to live with their husbands." *Mathews v. De Castro*, 429 U.S. 181, 189, 97 S.Ct. 431, 436, 50 L.Ed.2d 389 (1976).

Although *Oklahoma Education Association, supra,* does not involve an equal protection challenge to a Social Security regulation, we nonetheless believe it supports our resolution of the present controversy. In that case there was a constitutional challenge based on due process and equal protection grounds by state employees to a state constitutional provision, and an implementing state statute, which prohibited state employees from obtaining a state liquor license or working in an alcoholic beverage business that required such license. After determining that "state employees"

Wilson, 45 U.S. 221, 238, 101 S.Ct. 1074, 1085, 67 L.Ed.2d 186 (1981).

were not a suspect or quasi-suspect class and that accordingly, the rational relationship test should be used instead of a more exacting one, we concluded that there was a rational basis for prohibiting state employees from simultaneously working in the alcoholic beverage industry. The state's declared purposes for the legislation were threefold:

> (1) to prevent direct conflicts of interest with those state employees who have some authority over the administration and enforcement of the state's liquor laws; (2) to prevent the public perception that the state is involved with liquor trafficking; and (3) to prevent the state's encouragement of liquor consumption.

Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n, 889 F.2d at 933-34. We held that the Oklahoma statutory provisions were rationally related to further those goals.[4]

The judgment of the district court granting Spragens summary judgment on his equal protection claim is reversed. Otherwise, the district court's judgment is affirmed.

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[4] *See also Tuttle v. Secretary of Health, Education & Welfare*, 504 F.2d 61 (10th Cir.1974), where we held that a classification under the Social Security Act does not offend the constitution "'because in practice it results in some inequality.'" *Id.* at 63 (quoting *Lindsley v. Natural Carobonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)), and where we said that the test is whether the statute (or implementing regulation) manifests a patently arbitrary classification, and is utterly lacking in rational justification. *Tuttle*, 504 F.2d at 62.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. WYOMING

No. 91-CV-0173-B

Paul E. SPRAGENS, (Ref.: S3GCB, 463-92-2526),
Plaintiff,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant

Dec. 18, 1992

ORDER

BRIMMER, District Judge:

This matter comes before the Court on August 19, 1992. The Court, having considered the materials on file both in support of and in opposition to the motions, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

The facts of this case are not in dispute. Plaintiff Paul Spragens ("Spragens") is a quadriplegic, has no use of his arms, limited use of his legs, and is unable to walk. He suffers from a condition known as arthrogryposis, a congenital deformity.[1] Spragens filed this action pro se, seeking judicial review of the defendant's ("the

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[1] Arthrogryposis is a contracture of the joints. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 148 (25th Ed. 1974). Approximately one in three thousand people are inflicted by arthrogryposis at birth. The severity can vary greatly. Telephone Interview with Mary Anne Schmidt, Director of Avenue, National Support Group For Arthrogryposis Multiplex Congentia, Sonora, California (December 16, 1992).

Secretary") final decision that his period of disability ceased as of January 1986, because he was engaged in substantial gainful activity ("SGA") within the meaning of Title II of the Social Security Act ("the Act"), codified at 42 U.S.C. §§ 401-33 (1991).

In February 1976, Spragens was awarded disability and disability insurance benefits based on a finding of disability beginning in June 1974 due to arthrogryposis (Adm.Rec. 52). In September 1988, following a continuing disability review, the Social Security Administration ("SSA") made a finding that from January 1986 through December 1986, Spragens' average monthly net income for his work as a free-lance book indexer was $349.26. Because Spragens' net income exceeded $300 per month, the SSA determined that Spragens was engaged in substantial gainful activity and no longer qualified for disability benefits (Adm.Rec. 61-68).[2] This determination was upheld upon reconsideration (Adm.Rec. 76-77), and, following a hearing (Adm.Rec. 15-47), in a decision by an Administrative Law Judge (ALJ) (Tr. 7-10).[3] The Appeals Council adopted the Administrative Law Judge's decision, making it the Secretary's final administrative decision (Adm.Rec. 3-4).

The Secretary has moved the Court to affirm his administrative decision. Spragens has raised an equal protection issue and has moved for summary judgment.

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[2] Spragens' disability was determined to have ceased in January 1986, the first month of substantial gainful work after the completion of a trial work period (Adm.Rec. 76).

[3] The ALJ also found that Spragens had been overpaid for disability insurance benefits by $19,930 from April 1986 through May 1989 (Adm.Rec. 9, 69-71).

STANDARD FOR REVIEW

Substantial Evidence

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain review of such decision by a civil action . . . in the district court of the United States for the judicial district in which the plaintiff resides . . . .
>
> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.
>
> The findings of the Secretary as to any fact, if support by **substantial evidence**, shall be conclusive (emphasis added) . . . .
>
> 42 U.S.C. § 405(g) (1991).
>
> Substantial evidence is defined as 'sufficient relevant evidence in the record that a reasonable person might deem adequate to support the ultimate conclusion.'

Potter v. Secretary of Health & Human Services, 905 F.2d 1346, 1348 (10th Cir. 1990) quoting *Bernal v. Bowen*, 851 F.2d 297, 299 (10th Cir. 1988).

Summary Judgment

Summary judgment should be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

> In considering a party's motion for summary judgment, the court must examine all evidence in the light most favorable to the nonmoving party. *Barber v. General Elec. Co.* 648 F.2d 1272, 1286 n. 1 (10th Cir. 1981) . . . Under [Rule 56], the initial burden is

on the moving party to show the court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The moving party's burden may be met when that party identifies those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. at 2553.

Once the moving party has met these requirements, the burden shifts to the party resisting the motion. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S.Ct. at 2552; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party resisting the motion "may not rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. Anderson, 477 U.S. at 248, 106 S.Ct. at 2510. The mere existence of a scintilla of evidence will not avoid summary judgment; there must be sufficient evidence on which a jury could reasonably find for the nonmoving party. Id. at 251, 106 S.Ct. at 2511.

Manders v. Okl. ex rel. Dept. of Mental Health, 875 F.2d 263, 265 (10th Cir.1989).

DISCUSSION

Review of Administrative Decision

The Social Security Administration has a procedure for determining whether a claimant's disability continues or ends under the Act. 20 C.F.R. § 404.1594 (1991). The first step involves a determination of whether there has been medical improvement and if that improvement is related to a claimant's ability to work. *Id.* at § 404.1594(a). If there has been no medical improve-

ment,[4] benefits will continue unless an exception applies. *Id.* One of the exceptions requires a determination of whether the claimant has engaged in substantial gainful activity. 20 C.F.R. § 404.1594(d)(5)(1991). If the claimant has engaged in SGA and any applicable trial work period has been completed, the disability will be deemed to have ended. *Id.* at § 404.1594(f)(1).

Mr. Spragens' impairment did not improve, so the first step in the evaluation process was a determination of whether Spragens was engaged in SGA. The record shows that Spragens' net income in 1986 from self employment was $6,043 (Adm.Rec. 86, 110). After deducting $1,853 of allowable impairment related work expenses (Adm.Rec. 115), his income was $4,191, or an average of about $349 per month. This exceeded the $300 amount allowable under the regulations and created a presumption that Spragens was engaged in SGA and was no longer eligible to receive benefits. 20 C.F.R. § 404.1574(b)(2)(vi) (1991). Thus, the SSA determined, after a nine month trial work period, which ended in November 1978, and a fifteen month extended period of eligibility, which ended in February of 1982, that Spragens was engaged in SGA (Adm.Rec. 8-9).

Spragens does not disagree with the SSA records regarding his earnings or employment related work expenses, which were the basis for the administrative finding (Adm.Rec. 8-9). Because of Spragens' SGA, the Administrative Law Judge determined that Spragens' disability correctly ceased in January 1986, and that Spragens was overpaid disability insurance benefits by $19,930. *Id.*

This Court finds that there is substantial evidence in the record to support the administrative finding that Spragens was engaged in substantial gainful activity. Because Spragens was engaged in SGA, he "could not

[4] There is no evidence of medical improvement in this case.

be found disabled, regardless of the severity of his impairments." *Fowler v. Bowen*, 876 F.2d 1451, 1453 (10th Cir. 1989); *see also* 20 C.F.R. § 404.1520(b) (1991). For these reasons, the government's motion to affirm the administrative decision is granted.

Equal Protection Challenge

Spragens argues that 42 U.S.C. § 423(d)(4) (1991) violates the equal protection component of the Due Process Clause of the Fifth Amendment.[5] Section 423(d)(4) states that: "No individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed the exempt amount under section 403(f)(8) of this title which is applicable to individuals described in subparagraph (D) thereof." Under this section, a more lenient monthly earnings test is applied to a person disabled by reason of blindness, as opposed to some other cause, in determining whether that person is engaged in SGA. 42 U.S.C. § 423(d)(4); *see also* 20 C.F.R. 404.430, 404.1584(d) (1991).

In 1986, a person disabled by blindness could earn up to $650 per month without being engaged in SGA. 20 C.F.R. 404.430(d)(ix) (1991). By contrast, a person disabled by something other than blindness could only earn up to $300 per month without being engaged in SGA. 20 C.F.R. § 404.1574(b)(2)(vi) (1991). Spragens had net earnings of $349.26 per month in 1986. He was determined to be engaged in SGA, and lost all disability benefits. Had Spragens been disabled by reason of blindness, rather than by arthrogryposis, he would not have been engaged in SGA under the guidelines, and would not have lost his disability benefits.

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[5] "It is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles." *Mathews v. De Castro*, 429 U.S. 181, 182 n. 1, 97 S.Ct. 431, 432 n. 1, 50 L.Ed.2d 389 (1976).

This regulatory scheme creates a classification. People severely disabled by arthrogryposis, having net earnings between $300 and $650 per month, in 1986, were denied disability benefits. Whereas, people disabled by blindness, who earned between $300 and $650 per month, in 1986, received disability benefits.

In the area of social welfare, traditional equal protection analysis requires the challenged classification to be rationally related to some legitimate governmental interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); *Hodel v. Indiana,* 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87, 69 L.Ed.2d 40 (1981). "This is a two part test: the government interest must be legitimate and the challenged classification must be rationally related to the furtherance of that interest." *Medora v. Colautti*, 602 F.2d 1149, 1153 (3d Cir.1979).

In some instances, courts have departed from their "extreme deference to the legislature and engaged in a meaningful rational basis review." *The Supreme Court, 1987 Term Leading Cases,* 102 Harv.L.Rev. 201 (1988). In *Cleburne*, historical prejudice against the mentally retarded caused the Supreme Court to more carefully scrutinize a zoning board's actions. 473 U.S. at 450, 105 S.Ct. at 3259. The Third Circuit engaged in a more rigorous rational basis review in *Medora v. Colautti*, 602 F.2d 1149. *See also Ranschburg v. Toan,* 709 F.2d 1207 (8th Cir.1983).

In *Medora*, the Third Circuit said "[t]he importance of receiving welfare is not the sole reason we feel that close

scrutiny of rationality is justified in this case."[6] 602 F.2d at 1154 n. 12. "While the class definition here is based in some sense on the nonsuspect basis of wealth . . ., it is also based on the appellees' status as blind, aged, or *disabled* . . . ." *Id.* (emphasis added). "When classifications involve sensitive but nonsuspect classes, the courts may engage in a more substantial analysis of rationality." *Id.*

The disabled are a sensitive class, and are often discriminated against.[7] *See, e.g., O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396

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[6] Receipt of welfare benefits is an important right. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[7] Only recently have legislatures and courts begun to realize that, intentionally or not, the disabled have been systematically excluded from and denied access to governmental privileges and benefits that appear to have been made available to all on equal terms.

* * * * * * *

> The physical and mental impairments of the disabled have been the basis of their persistent social stigmatization and isolation, including the uninhibited exercise, in the not too distant past, of institutionalization as a mechanism for segregating those handicapped persons whose disabilities even their families did not understand or accept. Even when not physically isolated from society, disabled persons may experience painful ostracism in a culture that puts great weight on conformity to norms of appearance or performance that not all can meet. But whatever the source of the discrimination against the disabled -- whether from overtly invidious discrimination and stereotyping, or from an insidious blindness to the ramifications of rules that operate inexorably to exclude the disabled -- the rationale for semisuspect treatment of the handicapped is compelling. A history of continuous and pervasive deprivations and exclusions, the product of both legislative blindness and bias towards the disabled, justifies the exercise of heightened judicial scrutiny.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-31, at 1594-97 (2d ed. 1988).

(1975); *Alexander v. Choate*, 469 U.S. 287, 295-98, 105 S.Ct. 712, 717-19, 83 L.Ed.2d 661 (1985), *Cleburne*, 473 U.S. at 461, 105 S.Ct. at 3265; Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV.L.REV. 997 (1984). The Court finds that the severity of Spragens' disability, the undeniable discrimination against him,[8] and the fact that he lost all benefits[9] warrants a more exacting rational basis review.

A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Medora*, 602 F.2d at 1152, *quoting Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). The issue is whether there is a relevant characteristic of the blind as a class that justifies the disparate treatment. *See Cleburne*, 473 U.S. at 453, 105 S.Ct. at 3261; *Zobel v. Williams*, 457 U.S. 55, 70, 102 S.Ct. 2309, 2318, 72 L.Ed.2d 672 (1982).

The United States asserts that Congress' objective in passing 42 U.S.C. § 423(d)(4) was to provide greater assistance to the blind. The legislative history supports this contention. In arguing for passage of the Senate bill,[10] Senator Bayh stated that the "earning limitation"

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[8] In Spragens' social security file, one of the SSA employees referred to Spragens as "hideously deformed."

[9] If the discrepant treatment "involves denial of all aid, the courts will more closely examine the rationality of the underlying classification." *Medora*, 602 F.2d at 1154; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, 92, S.Ct. 1400, 1405, 31 L.Ed.2d 768 (1972).

[10] In 1977, the United States Senate passed an amendment to the Social Security Act that, among other things, would have permitted the Secretary to consider a legally blind worker disabled "regardless of earnings and capacity to work." Staffs of the House Subcommittee on Social Security of the Comm. on Ways and

to qualify for disability benefits should be removed for blind people because "[t]he blind, as a group, suffer largely artificial impediments when they seek to enter and compete in the labor market. The economic penalties exacted by discrimination are evident in a dramatic 70 percent rate of unemployment and underemployment." 123 Cong.Rec. 37,139-40 (1977).

However, the Eighth Circuit has stated that "[a] decision to favor one group of recipients over another *by itself* is not a legitimate interest." *Ranschburg,* 709 F.2d at 1211 (emphasis added). In addition, the Third Circuit noted:

> [I]t is always possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another. A statute's classifications will invariably be rationally related to a purpose so defined, since the "purpose" is, in effect, a restatement of the classification. To engage in such hypothesizing, however, would render the rational basis standard no standard at all.

Delaware River Basin Commission v. Bucks County Water & Sewer Authority, 641 F.2d 1087, 1099-1100 (3d Cir.1981). Therefore, the Court finds that providing greater assistance to the blind *by itself* is not a legitimate objective.

The legislative history supporting 42 U.S.C. § 423(d)(4) suggests that another Congressional

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Means and Senate Comm. on Finance, 95th Cong., 1st Sess., Social Security Financing Amendments of 1977, H.R. 9346, *Comparison of House and Senate Bills With Existing Law 38-39* (Joint Comm. Print, Nov. 28, 1977). The House bill did not have a similar provision benefiting the blind. *Id.* The conference committee bill, which became law, provided that the amount of earnings used to determine SGA for the blind, would be "increased to the same exempt amounts as for persons 65 and over under the liberalized retirement test . . . ." 123 Cong.Rec. 39,032 (1977).

objective may be to give greater federal assistance to the most needy. Senate and House conference committee members felt that "blind persons experience *greater* ongoing financial problems in seeking permanent employment than other disabled individuals . . . ." 123 Cong.Rec. 39,032 (1977) (emphasis added).

While giving greater federal assistance to the most needy is a legitimate objective, the Court holds that 42 U.S.C. § 423(d)(4) is not rationally related to that objective. *See Ranschburg,* 709 F.2d at 1210. More specifically, the Court does not believe that a blind person suffers **greater** ongoing financial problems in seeking permanent employment than a person such as Spragens, who is severely disabled by arthrogryposis.

The Court reasons that arthrogryposis cannot be rationally distinguished from blindness in this context. Like blindness, arthrogryposis is a permanent and irreversible condition. A blind person and a quadriplegic with arthrogryposis both must overcome obstacles to secure and hold employment. In overcoming the loss of sight, a blind person can use braille and computers as tools, and a seeing eye dog to assist with mobility. Spragens has no use of his arms and limited use of his legs, and cannot walk. Nevertheless, he is able to use a computer to assist him in his work as a free-lance book indexer.[11] In addition, he has a motorized wheelchair which partially compensates for his inability to walk.

Although Spragens is intellectually capable, his employment is severely limited by his physical disabilities. Arthrogryposis has emaciated his body, causing one SSA employee to refer to him as "hideously deformed." In this respect, the Court believes that discrimination against Spragens would be *greater* than

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[11] Spragens is able to write and type with his feet.

that against a blind person.[12] For these reasons, the Court concludes a blind person and a person like Spragens are similarly situated, and that there are no relevant characteristics of a blind person that can justify such disparate treatment.

The Court finds that 42 U.S.C. § 423(d)(4) "ignores the common denominator of need, and creates a classification that bears no [rational] relation" to the legislative purpose of giving greater assistance to the most needy. *Medora*, 602 F.2d at 1152. Under the terms of 42 U.S.C. § 423(d)(4), government benefits are not made available to the blind and other severely disabled persons on equal terms.

Although the United States has not done so, it may argue that another reason for the classification at issue is to save welfare costs. However, this is not a legitimate objective. "The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro v. Thompson,* 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600 (1969).

The Court concludes that many of the statements about the blind in the legislative history for 42 U.S.C. § 423(d)(4) apply equally to a person severely disabled by arthrogryposis. Senator Bayh stated that "the strongest argument for this proposal before the Senate is the need to remove disincentives to gainful activity, and to encourage every person to seek work, to contribute, and to become independent." 123 Cong.Rec. 37,140 (1977). Like the blind, people severely disabled by arthrogryposis "are being sidelined from productive participation in our economy through an unintentional

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[12] The Court believes that Spragens "may experience painful ostracism in a culture that puts great weight on conformity to norms of appearance or performance that not all can meet." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-31, at 1594-97 (2d ed. 1988).

bias against work, which has been built into the disability insurance system." *Id.* "It just does not make sense to hold back people who want to overcome their handicap and make their own way in the world." *Id.* at 37, 141.

For the above-listed reasons, the Court finds that Congress' classification in 42 U.S.C. § 423(d)(4), which singles out the blind for preferential treatment, is arbitrary and discriminatory. As applied to Spragens, it does not have "a fair and substantial relationship to the object of the legislation . . . ." *Medora*, 602 F.2d at 1152, *quoting Reed*, 404 U.S. at 76, 92 S.Ct. at 254. A classification is not rationally based simply because Congress chose to provide benefits to some but not to others. *See Ranschburg,* 709 F.2d at 1211.

THEREFORE it is

ORDERED that the United States' motion to affirm the administrative decision be, and the same is hereby GRANTED.

ORDERED that 42 U.S.C. § 423(d)(4), as applied to Spragens, violates the equal protection component of the Fifth Amendment to the United States Constitution. Therefore, plaintiff's motion for summary judgment is hereby GRANTED.

ORDERED that the Social Security Administration reinstate Spragens' eligibility to receive disability benefits.

ORDERED that the Social Security Administration pay Spragens all disability benefits for the period that he was deemed to be ineligible because he was engaged in substantial gainful activity.

ORDERED that Spragens does not owe the Social Security Administration $19,930, an amount that was allegedly overpaid to Spragens for disability benefits.

APPENDIX C

Statutory Provision

42 U.S.C. § 423(d)(4):

The Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. No individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed the exempt amount under section 403(f)(8) of this title which is applicable to individuals described in subparagraph (D) thereof. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 422(c) of this title, be found not to be disabled. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Secretary in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to reasonable limits as the Secretary may prescribe.

APPENDIX D

Regulatory Provisions

20 C.F.R. § 404.430(d):

Method of determining monthly exempt amount for taxable years ending after December 1977 for beneficiaries, age 65 or over. (1) For purposes of paragraph (a)(3) of this section, for all months of taxable years ending after 1977, the applicable monthly exempt amount for an individual who has attained (or, but for the individual's death occurring after November 10, 1988, would have attained) retirement age as defined in section 216(l) of the Act before the close of the taxable year involved is --

(i) $333.33 1/3 for each month of any taxable year ending in 1978;

(ii) $375 for each month of any taxable year ending in 1979;

(iii) $416.66 2/3 for each month of any taxable year ending in 1980; and

(iv) $458.33 1/3 for each month of any taxable year ending in 1981;

(v) $500 for each month of any taxable year ending in 1982;

(vi) $550 for each month of any taxable year ending in 1983;

(vii) $580 for each month of any taxable year ending in 1984;

(viii) $610 for each month of any taxable year ending in 1985;

(ix) $650 for each month of any taxable year ending in 1986;

(x) $680 for each month of any taxable year ending in 1987;

(xi) $700 for each month of any taxable year ending in 1988;

(xii) $740 for each month of any taxable year ending in 1989; and

(xiii) $780 for each month of any taxable year ending in 1990.

(2) Fractional amounts listed in paragraph (d)(1) of this section shall be rounded to the next higher whole dollar amount, unless the individual shows that doing so results in a different grace year (see § 404.435(a) and (c)).

* * * * *

20 C.F.R. § 404.1574(b)(2):

Earnings that will ordinarily show that you have engaged in substantial gainful activity. We will consider that your earnings from your work activities as an employee show that you have engaged in substantial gainful activity if --

(i) Your earnings averaged more than $200 a month in calendar years prior to 1976;

(ii) Your earnings averaged more than $230 a month in calendar year 1976;

(iii) Your earnings averaged more than $240 a month in calendar year 1977;

(iv) Your earnings averaged more than $260 a month in calendar year 1978;

(iii) Your earnings averaged more than $280 a month in calendar year 1979;

(vi) Your earnings averaged more than $300 a month in calendar years after 1979 and before 1990; or

(vii) Your earnings averaged more than $500 a month in calendars years after 1989.

(2)

Supreme Court, U.S.
FILED
MAR 7 1995
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No. 94-1102

In the Supreme Court of the United States

OCTOBER TERM, 1994

PAUL E. SPRAGENS, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 42 U.S.C. 423(d)(4) and implementing regulations, which allow blind people to earn more money than may be earned by other claimants without becoming ineligible for disability benefits, comport with equal protection as applied to petitioner, a sighted person.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 36 F.3d 947. The opinion of the district court (Pet. App. 9a-22a) is reported at 808 F. Supp. 1537.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1994. The petition for a writ of certiorari was filed on December 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Social Security Act provides insurance benefits for people who cannot engage in substantial gainful activity because of a physical or mental disability. 42 U.S.C. 423(a). One requirement for eligibility under the Act is thus the "inability to engage in any substantial gainful activity." 42 U.S.C. 423(d)(1)(A). The Act authorizes the Secretary of Health and Human Services (the Secretary) to "prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity." 42 U.S.C. 423(d)(4). Pursuant to that authority, the Secretary provided by regulation that, for calendar years 1979 through 1989, if a claimant earned more than $300 per month after deductions for relevant expenses, the claimant was presumed to have engaged in substantial gainful activity and therefore to be ineligible for disability benefits. 20 C.F.R. 404.1574(b)(2)(vi).

The Act contains a special provision, however, concerning the amount that blind people may earn before being presumed to have engaged in substantial gainful activity (42 U.S.C. 423(d)(4)):

> No individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed the exempt amount under section 403(f)(8) of this title, which is applicable to individuals described in subparagraph (D) thereof.

The referenced provision, 42 U.S.C. 403(f)(8), prescribes the monthly earnings test for a retired person aged 65-69. The legislative history of the earnings provision for the blind in Section 423(d)(4) indicates that its purpose

was to increase the amount that blind people could earn and still remain eligible for disability benefits by applying the "liberalized retirement test" to them. 123 Cong. Rec. 39,032 (1977). For 1986, the "exempt amount" for purposes of Section 423(d)(4) was set by regulation at $650 per month. 20 C.F.R. 404.430(d)(ix).

Thus, in 1986, blind claimants could earn up to $650 per month, whereas sighted claimants could earn only up to $300 per month, and remain eligible for disability benefits. See 42 U.S.C. 403(f)(8), 416(*l*); 20 C.F.R. 404.430, 404.1584(d).[1]

b. Petitioner suffers from arthrogryposis, a deformity of the joints. Pet. App. 1a, 9a. He cannot use his arms, has only limited use of his legs, and must use a motorized wheel chair. *Id.* at 1a n.1, 9a. He has, however, learned to type with his feet and uses that ability to work as a free-lance book indexer. See *ibid.*

Petitioner became eligible for disability benefits in 1976. Pet. App. 10a. In 1988, after a periodic review, the Secretary determined that, beginning in 1986, petitioner's average monthly income exceeded $300. Under the Secretary's regulations, therefore, petitioner had been engaging in substantial gainful activity for about two years. In an initial decision and on reconsideration, the Secretary terminated petitioner's benefits and determined that an overpayment of approximately $19,000 (for some prior months) had been made. *Id.* at 1a-2a.

Petitioner took an administrative appeal. In that appeal, he did not argue that the Secretary misapplied or misinterpreted the applicable statutory and regulatory provisions. Nor did he dispute that, under those provisions, he became ineligible for benefits in 1986. His

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[1] Those amounts have been increased for later calendar years. See 20 C.F.R. 404.430(d); 20 C.F.R. 404.1574(b)(2)(vii).

sole contention was that the statutory and regulatory earnings provisions for the blind in 42 U.S.C. 423(d)(4) and implementing regulations are unconstitutional. An administrative law judge (ALJ) declined to address petitioner's constitutional argument and upheld the Secretary's initial and reconsidered determination. The Appeals Council within the Social Security Administration affirmed the ALJ's decision, making that decision the final decision of the Secretary on petitioner's claim. Pet. App. 2a.[2]

2. Petitioner then brought this action in the United States District Court for the Northern District of Wyoming, seeking review of the Secretary's decision. See 42 U.S.C. 405(g). On the government's motion to affirm the Secretary's decision and petitioner's motion for summary judgment, the court held that, as applied to petitioner, 42 U.S.C. 423(d)(4) violates the equal protection component of the Due Process Clause of the Fifth Amendment. See Pet. App. 21a. The district court first determined, relying primarily upon *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), that

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[2] The Secretary's regulations provide for a waiver of the recovery of any overpayment if the individual receiving the overpayment is without fault and if, among other things, recovery would deprive a person of income required for living expenses. See 20 C.F.R. 404.506; see also *Sullivan* v. *Everhart*, 494 U.S. 83, 86 (1990). Petitioner could have sought a waiver of recovery of the $19,000 overpayment in his administrative appeal. Moreover, petitioner was aware of the waiver procedure; he told the ALJ: "[I]f we leave the overpayment issue unresolved, then there's more at stake in my constitutional challenge and a judge may be more willing to listen to it since it not only involves my right to continue receiving benefits but also involves $19,000 in alleged overpayment." C.A. App. 66. He then stated that he did not wish a ruling on the waiver-of-recovery issue at that time. *Ibid.*

the provision was subject to "a more substantial" standard of review than the usual "rational basis" standard, because "[t]he disabled are a sensitive class, and are often discriminated against." Pet. App. 16a.

Applying that standard, the district court rejected the government's argument that the earnings provision for the blind is justified by Congress's determination that the blind, as a class, suffer greater financial problems in seeking permanent employment than do people with other disabilities. Pet. App. 17a-18a. The court recognized that the legislative history of the provision reflected such a determination. *Id.* at 17a-19a & n.10. But the court disagreed with that determination, at least on the facts of this case, stating: "[T]he Court does not believe that a blind person suffers greater ongoing financial problems in securing permanent employment than a person such as [petitioner]." *Id.* at 19a (emphasis omitted).

In addition to declaring 42 U.S.C. 423(d)(4) unconstitutional, the district court ordered the Social Security Administration to "reinstate [petitioner's] eligibility to receive disability benefits" and to pay him "all disability benefits for the period that he was deemed to be ineligible because he was engaged in substantial gainful activity." Pet. App. 21a.[3]

3. The court of appeals reversed the district court's award of summary judgment for petitioner on his

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[3] Although the district court sustained petitioner's equal protection challenge, it granted the government's motion to affirm the Secretary's decision. Pet. App. 14a, 21a. The affirmance reflected the court's determination that, without regard to petitioner's constitutional challenge, "there is substantial evidence in the record to support the administrative finding that [petitioner] was engaged in substantial gainful activity" under the relevant statutory and regulatory provisions. *Id.* at 13a.

constitutional claim. Pet. App. 1a-8a. The court of appeals held, first, that "the 'rational basis' test is the proper standard of review," and not the "more exacting standard" used by the district court. *Id.* at 5a. The court of appeals explained that "a classification applying to blind persons is not suspect, or even quasi-suspect." *Id.* at 6a.[4] The court further held that Section 423(d)(4) and its implementing regulations have a rational basis (Pet. App. 6a (citation omitted)):

> [I]t is reasonable to conclude that blind persons are in a less favorable position than others who, though suffering from disabilities, nonetheless still have their eyesight. And the fact, if it is a fact, that [petitioner] may have "more disability" than *some* blind persons does not change the result. A classification scheme of this sort does not have to be perfect.

ARGUMENT

The court of appeals correctly rejected petitioner's equal protection challenge to the statutory and regulatory provisions that allow blind people to earn more money without becoming ineligible for disability benefits than other claimants are allowed to earn. This Court's decisions make clear that the rational basis standard is the appropriate standard for judicial review of a federal statute dispensing benefits among the disabled. The court of appeals also correctly held that the provisions at issue here have a rational basis. Those holdings do not conflict with any decision of this Court

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[4] The court of appeals added that the standard of review "may be academic in a sense, since, regardless of the standard used, the result in the instant case would, in [its] view, be the same." Pet. App. 6a.

or another court of appeals. Further review is therefore unwarranted.

1. Petitioner contends that *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), requires something "beyond ordinary rational basis review" of the earnings provision for the blind. Pet. 11. The court of appeals correctly rejected that contention. See Pet. App. 5a-6a.

In *Cleburne*, this Court held that the court of appeals in that case had erred by applying "a more exacting standard of judicial review than is normally accorded economic and social legislation" to a local zoning ordinance that required group homes for the mentally retarded to obtain special use permits. 473 U.S. at 442. The Court determined that mental retardation is not a suspect or quasi-suspect classification. *Id.* at 442-447. Based on that determination, the Court concluded that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose." *Id.* at 446.

Heller v. *Doe by Doe*, 113 S. Ct. 2637 (1993), defeats petitioner's contention that *Cleburne* supports the application of something "beyond ordinary rational basis review" (Pet. 11) in this case. *Heller* concerned an equal protection challenge to state involuntary commitment statutes that treated the mentally retarded differently from the mentally ill. 113 S. Ct. at 2640-2641. In discussing the appropriate standard of review, the Court stated (*id.* at 2643):

> We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) * * *; *Schweiker* v.

> *Wilson*, [450 U.S. 221 (1981)]. In neither case did we purport to apply a different standard of rational-basis review from [the traditional deferential test] just described.

It is especially clear from *Heller*'s citation to *Schweiker* v. *Wilson* that the traditional rational basis standard applies to a federal statute, such as 42 U.S.C. 423(d)(4), that distributes welfare benefits among non-suspect classes of the needy. See *Wilson*, 450 U.S. at 222, 230-239 (applying traditional rational basis standard to uphold provision that withholds Supplemental Security Income benefits from otherwise eligible individuals aged 21 through 64 in public mental institutions that do not receive Medicaid funds for the individuals' care).

Heller also defeats petitioner's contention (Pet. 11) that further review is warranted to resolve divisions among the lower federal courts regarding the standard applied in *Cleburne*. Petitioner cites decisions from only one court of appeals that have read *Cleburne* to require greater scrutiny than normally accorded under rational basis review. See Pet. 12 (citing *Pruitt* v. *Cheney*, 963 F.2d 1160 (9th Cir.), cert. denied, 113 S. Ct. 655 (1992), and *High Tech Gays* v. *Defense Indus. Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990)). Those decisions, however, pre-date *Heller*. Moreover, none of them concerns a federal statute, such as Section 423(d)(4), that does not discriminate against the disabled but instead distributes welfare benefits among categories of disabled persons in proportion to Congress's reasonable determination regarding their relative needs.[5]

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[5] Petitioner also cites decisions in which other courts of appeals have "assum[ed] arguendo that heightened scrutiny applies" to legislative classifications based on disability. Pet. 12. Those deci-

Thus, the court of appeals in this case correctly held that Section 423(d)(4) and its implementing regulations must be upheld "if there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Pet. App. 6a n.3 (quoting *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993)); accord *Heller*, 113 S. Ct. at 2642-2643 (quoting *Beach Communications*).

2. The court of appeals, applying the foregoing standard, correctly held that Section 423(d)(4) and its implementing regulations have a rational basis and therefore do not violate equal protection. See Pet. App. 6a-8a. Petitioner's contrary claim (Pet. 14-20) is without merit.

As an initial matter, petitioner errs in asserting (Pet. 16-17) that the statute and regulations fail the rational basis test because petitioner suffers a degree of disability comparable to that caused by blindness. A federal statute providing for the payment of government benefits "inevitably involves the kind of line-drawing that will leave some comparably needy person outside the favored circle." *Schweiker* v. *Wilson*, 450 U.S. at 238.[6] Such a statute is not irrational merely because the line "is not made with mathematical nicety or because in

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sions also pre-date *Heller* and, in any event, do not conflict with the decision below.

[6] See also *Beach Communications*, 113 S. Ct. at 2102 ("Defining the class of persons subject to a regulatory requirement—much like classifying government beneficiaries—'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'") (quoting *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)).

practice it results in some inequality." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). In particular, rational basis review provides "no basis for [a court's] requiring individualized determinations [of neediness] when Congress can rationally conclude * * * that generalized rules are appropriate to its purposes and concerns." *Weinberger* v. *Salfi*, 422 U.S. 749, 785 (1975); see also *Califano* v. *Aznavorian*, 439 U.S. 170, 177-178 (1978).[7]

The legislative history of the earnings provision for the blind in Section 423(d)(4) shows that Congress considered blindness to be "a distinct and unique condition." 123 Cong. Rec. 37,139 (1977) (statement of Sen. Bayh). In arguing for passage of a special earnings provision for the blind, Senator Bayh explained (*ibid.*):

> The blind, as a group, suffer largely artificial impediments when they seek to enter and compete in the labor market. The economic penalties exacted by discrimination are evident in a dramatic 70 percent rate of unemployment and underemployment. Any group with such a high rate merits being singled out for compensatory help, for particular assistance to meet their problems.

In addition, Senator Humphrey observed that the bill provided "reasonable exceptions to redress handicaps and disadvantages imposed by social and economic barriers that have barred the blind, far more than their disability,

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[7] Petitioner thus errs in contending that the court of appeals "erred by disposing of petitioner's challenge as if it were a facial rather than an as applied challenge." Pet. 16. Rational basis challenges, as applied, do not require a court to consider whether a classification is rational in light of a particular individual's circumstances; it is the rationality of the distinction between categories that is important.

from earning a decent and secure livelihood." *Id.* at 37,140.[8] Representative Bingham stated that "concerned members of the House [believed that] blind persons experience greater ongoing financial problems in seeking permanent employment than other disabled individuals, which require special consideration." *Id.* at 39,032.

Congress could reasonably determine that the blind, as a group, suffer greater financial hardships because of their blindness than do people with other disabilities, as a group. Blindness poses a unique challenge to obtaining gainful employment, because vision is commonly regarded as central to the ability to: (1) perform physical labor that requires hand-to-eye coordination, (2) navigate to and from places of employment, and (3) process information, which is delivered, in our society, overwhelmingly through the printed word or visual images.

It is, of course, true that many blind people are successful in the job market, as in all other areas of society. It is also true that another disability might, in a particular case, pose challenges to engaging in gainful employment that are comparable to those posed by blindness. Neither fact, however, provides a basis for striking down the statutory provisions and regulations at issue under the rational basis test.[9]

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[8] Senator Humphrey also noted that the "unemployment rate of 70 percent * * * is related more directly to social attitudes and discrimination than to incapacity." 123 Cong. Rec. 37,140 (1977). And Senator Bayh noted studies showing a "dramatic" rate of unemployment and underemployment among the blind attributable to the "substantial and overwhelming economic disadvantages" the blind must face. *Id.* at 4816.

[9] In any event, the court of appeals correctly held that the earnings provisions for the blind would be constitutional even under more exacting scrutiny. Pet. App. 6a. That holding, of

3. In this Court, petitioner argues that heightened scrutiny of the earnings provisions for the blind in 42 U.S.C. 423(d)(4) and implementing regulations is required by the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* That argument is not properly presented in this Court, because it was not presented in the courts below. In any event, the argument is without merit.

Petitioner did not argue in the courts below that heightened scrutiny was required by the ADA; he relied solely on *Cleburne*. See, *e.g.*, Pet. C.A. Br. 13 ("'*Cleburne*' Equal Protection analysis applies to Paul Spragens."). He cited the ADA only as support for what he regarded as a more exacting rational basis standard adopted in *Cleburne*. See *id.* at 15 ("In light of the ADA, to apply any rational basis reasoning other than the one explained in *Cleburne* and its progeny to Mr. Spragens would be illogical."). In *Heller*, this Court held that, when a "heightened scrutiny argument [is pressed] for the first time [in this Court]," it would be "inappropriate," as well as "imprudent and unfair," to consider that question for the first time in this Court. 113 S. Ct. at 2642. That holding fully applies here.[10]

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course, weighs against further review of the issue of the proper level of scrutiny.

[10] This Court's recent decision in *Lebron* v. *National Railroad Passenger Corp.*, No. 93-1525 (Feb. 21, 1995), is not to the contrary. In *Lebron*, the Court exercised its discretion to address an argument that had not been raised in the courts below, because the argument concerned an issue that was logically prior to the issue presented by an argument that had been raised in the lower courts, and because resolution of the two arguments involved overlapping considerations. *Lebron*, slip op. 7. Neither circumstance obtains with respect to petitioner's ADA-based argument. That argument need not be resolved in order to address peti-

Petitioner's ADA argument relies on the following statement in *Cleburne*, 473 U.S. at 439-440 (emphasis added):

> Section 5 of the [Fourteenth] Amendment empowers Congress to enforce th[e] [equal protection] mandate [of that Amendment], but *absent controlling congressional direction*, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.

Petitioner asserts that the findings in the ADA regarding discrimination against the disabled furnish "the 'controlling congressional direction' that was missing in *Cleburne*." Pet. 9. Petitioner argues that, "[b]ecause the ADA was expressly enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment, * * * the ADA should be seen as a directive to the judiciary to apply heightened scrutiny to laws that differentially treat the disabled." Pet. 8-9.

Even assuming petitioner's argument were properly before the Court, it does not warrant further review in this case, for several reasons. First, the provision in the ADA upon which petitioner relies (Pet. 8) merely sets forth several of the findings upon which the Act was based. See 42 U.S.C. 12101(a)(7) (Supp. V 1993). The provision does not, on its face, direct courts to do anything. Accordingly, the two courts of appeals that have

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tioner's *Cleburne* argument, and resolution of the two arguments involves quite different considerations.

considered the issue have held that the ADA does not "alter the standard [of review] of constitutional equal protection claims." *More* v. *Farrier*, 984 F.2d 269, 271 n.4 (8th Cir.), cert. denied, 114 S. Ct. 74 (1993); see *Contractors Ass'n of Eastern Pennsylvania, Inc.* v. *City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993).[11] In the absence of a circuit conflict and of a proper airing of the issue below, this case provides no occasion for further review of petitioner's argument.

Second, petitioner errs in asserting (Pet. 8) that Congress's power under Section 5 of the Fourteenth Amendment provides a basis for applying heightened scrutiny in this case. This case concerns a *federal* statute and regulations; the equal protection mandate of the Fourteenth Amendment, however, is directed to the *States*. Moreover, the substantive provisions of the ADA do not apply to the administration of the Social Security disability program. Compare 42 U.S.C. 12131 *et seq.* (prohibiting discrimination in state and local programs). There accordingly is no basis for relying on a prefatory congressional finding in the ADA in order to subject distinctions drawn in the federally administered Social Security disability program to a different standard of judicial review than would have applied in the absence of the ADA. There is, in other words, no basis for concluding that Congress, in enacting the ADA, intended to call into question the myriad judgments and dis-

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[11] Petitioner cites one district court decision holding that the ADA requires heightened scrutiny of classifications based on disability. Pet. 10 (citing *Martin* v. *Voinovich*, 840 F. Supp. 1175, 1210 (S.D. Ohio 1993)). However, this "Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 178 (7th ed. 1993).

tinctions that have long been made regarding various impairments under the Social Security disability program, cf. *Alexander* v. *Choate*, 469 U.S. 287, 307 (1985)—much less to authorize the federal courts to hold a provision of the Social Security Act unconstitutional.

Congress presumably would have authority under provisions of the Constitution other than Section 5 of the Fourteenth Amendment to enact legislation requiring the federal courts to subject features of federal benefit programs to some sort of exacting judicial review. Cf. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* But, contrary to petitioner's suggestion, the question whether Congress has actually exercised such authority in the ADA is quite distinct from the question whether Congress has exercised its authority under Section 5 to subject state and local statutory provisions to more exacting judicial scrutiny than would otherwise apply.

Finally, the ADA findings upon which petitioner relies are not relevant to the classifications of relative need that are at issue here. The ADA findings detail the ways in which disabled people, as a class, are treated less favorably in the work force than people without disabilities. See 42 U.S.C. 12101(a) (Supp. V 1993). The provisions of the Social Security Act and implementing regulations at issue here do not treat disabled people less favorably than non-disabled people. Indeed, the purpose of the disability program as a whole is to provide benefits to people with disabilities that prevent them from engaging in substantial gainful employment. The provisions petitioner challenges accomplish that purpose by making a distinction *within* the class of disabled persons who apply for benefits. That distinction reflects Con-

gress's reasonable determination of where the greatest need lies, rather than any invidious discrimination.[12]

Similar distinctions are made in every social welfare program. If Congress had intended in the ADA to subject that sort of distinction to heightened scrutiny, it would have made that intention unmistakably plain in the text of the ADA. In the absence of such an expression of intent, the court of appeals applied the proper standard of review to the provisions at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995

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[12] Petitioner cites decisions of this Court that, he contends, applied strict scrutiny to classifications that divided the suspect class "into two subgroups." Those decisions, however, concern circumstances where only part of a suspect class is disadvantaged compared to the nonsuspect class. *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977), for example, concerned the denial of state financial assistance to certain resident aliens. Such cases are inapposite here, because the class assertedly entitled to heightened scrutiny (people with disabilities that preclude substantial gainful employment) is treated favorably compared to those outside the class.

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No. 94-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PAUL E. SPRAGENS,
Petitioner,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Congress' purpose in enacting the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1). By expressly finding in the ADA that classifications drawn on the basis of disability are inherently suspect, see *id.* § 12101(a)(7), Congress plainly intended for the judiciary to participate in that "national mandate" by applying heightened scrutiny to such classifications in equal protection cases. This is an issue of obvious significance and one that has divided the lower courts.

This Court should therefore grant certiorari in this case to consider the substantial arguments supporting petitioner's position. See *Heller v. Doe,* 113 S. Ct. 2637, 2650 n.1 (1993) (Souter, J., dissenting); James B. Miller, Note, *The Disabled, The ADA, & Strict Scrutiny,* 6 St. Thomas L. Rev. 393 (1994); Neil D. O'Toole, *The ADA: Strict Scrutiny Protection for Disabled Workers,* 21 Colo. Law. 733 (1992); Timothy Cook, *The Americans With Disabilities Act: The Move to Integration,* 64 Temple L. Rev. 393, 437-39 (1991); *Martin* v. *Voinovich,* 840 F. Supp. 1175, 1210 (S.D. Ohio 1993); see also Pet. 8-9.

a. The government argues that § 12101(a)(7) of the ADA is merely a "prefatory congressional finding" (Br. in Opp. 14) that does not "direct courts to do anything" (*id.* at 13). This completely misjudges the significance of Congress' findings in § 12101(a)(7) and of the ADA as a whole. This Court's equal protection jurisprudence, of which Congress is well aware, *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), establishes that suspect classifications receive heightened scrutiny under the Fifth and Fourteenth Amendments. Under this Court's cases, whether or not a classification is inherently suspect is essentially a factual and historical question and in enacting the ADA, Congress determined that disability-based classifications are "suspect" within the meaning of this Court's jurisprudence. See 42 U.S.C. § 12101(a)(7). Congress is particularly qualified to make such a finding because it was acting pursuant to is power under Section 5 of the Fourteenth Amendment. See *Fullilove* v. *Klutznick,* 448 U.S. 448, 476-78 (1980); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 (1966); 42 U.S.C. § 12101(b)(4). Accordingly, after finding that the disabled are a suspect class, Congress did not need to tell the courts to "do anything" because the Constitution itself already commands the judiciary to enforce the right of equal protection and this Court's heightened scrutiny cases already dictate the terms of that protection. Congress'

finding in § 12101(a)(7) thus triggers heightened scrutiny of disability classifications under the Constitution and this Court's precedents.

This analysis is confirmed by *Frontiero* v. *Richardson,* 411 U.S. 677 (1973). There, this Court accepted the argument that sex-based classifications are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682. The Court's decision was guided in significant part by Congress' adoption of Title VII and the Equal Pay Act. Neither of those laws "told" the courts to apply heightened scrutiny to sex classifications; rather, the two laws demonstrated that "Congress itself has concluded that classifications based on sex are inherently invidious." 411 U.S. at 687. Precisely the same is true here. Indeed, the argument that the ADA requires heightened scrutiny is even stronger than the parallel argument accepted in *Frontiero* because the ADA contains an explicit congressional finding that the disabled are a suspect class. In sum, the government's claim that the ADA does not tell the judiciary to apply heightened scrutiny entirely misses the point. The point is that the very adoption of the ADA provides the "controlling congressional direction" that was absent in *City of Cleburne* v. *Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985), was present in *Frontiero,* and is now present here.[1]

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[1] That "the substantive provisions of the ADA do not apply to the administration of the Social Security disability program" (Br. in Opp. 14) is irrelevant. Congress certainly made no finding in the ADA that the "history of purposeful unequal treatment" of the disabled excludes the federal government. 42 U.S.C. § 12101(a)(7). Indeed, Congress has expressly applied the ADA to the federal government to the extent consistent with its obligation to respect principles of separation of powers. See Congressional Accountability Act of 1995, §§ 102(a)(3), 201(a)(3), 505, Pub. L. No. 104-1 (Jan. 23, 1995) (applying the ADA to Congress and other legislative branch institutions and instructing the Judicial Conference to prepare a report on the application of the ADA to the federal judiciary).

b. The government also argues that Section 5 does not "provide[ ] a basis for applying heightened scrutiny in this case" because "[t]his case concerns a *federal* statute and regulations; the equal protection mandate of the Fourteenth Amendment, however, is directed to the *States*." Br. in Opp. 14. In the first place, this is completely inconsistent with the position taken by the Solicitor General in *Adarand Constructors, Inc.* v. *Peña,* No. 93-1841 (pending). There, on page 38 of his main brief, the Solicitor General states that "[p]etitioner errs in contending that Congress's Section 5 powers are not relevant here because this case 'involves a federal program implemented by a federal agency' and 'no state or local government is involved.' " One would have thought that the Solicitor General would observe a modicum of consistency in his submissions to this Court, at the very least in cases falling within the same Term. In any event, the position taken here by the Solicitor General is wrong: " 'This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.' " *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.,* 483 U.S. 522, 542 n.21 (1987) (quoting *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975)). See also *United States* v. *Paradise,* 480 U.S. 149, 166 n.16 (1987); *Buckley* v. *Valeo,* 424 U.S. 1, 93 (1976). If a classification is suspect under the Fourteenth Amendment, it is also suspect under the Fifth. That proposition was established in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), and cannot now be doubted.

c. The government seeks to defend the discrimination at issue here on the ground that it involves "a distinction *within* the class of disabled persons" (Br. in Opp. 15). But discrimination in favor of one category of disabled persons over another is just as unacceptable under the ADA and just as deserving of heightened scrutiny as is discrimination in favor of the non-disabled over the disabled. Pet. 9 n.5. The ADA

forbids and makes actionable discrimination "between persons with different handicaps" as well as "between handicapped persons and non-handicapped persons." *Martin* v. *Voinovich, supra*, at 1191; see also *id.* at 1192.

Furthermore, this Court has held in a virtually identical context that discrimination between subclasses of persons belonging to the same suspect class warrants heightened scrutiny. In *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974), the Court applied heightened scrutiny to, and invalidated, a provision of the Social Security Act that "discriminate[d] between . . . two subclasses" of illegitimate children in the award of benefits. *Id.* at 636. As then-Justice Rehnquist observed in dissent, the Court did not "strik[e] down the legislation on the basis of discrimination between legitimates and illegitimates" (*id.* at 638) but did so -- after applying "some form of stricter scrutiny" -- because the "discrimination [was] between classes of illegitimates." *Id.* at 639. In this case, as in *Jimenez,* the Social Security Act discriminates in the award of benefits between two subclasses of persons who fall within a single suspect class. It therefore deserves heightened scrutiny. See also *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972).

d. The government's contention (Br. in Opp. 12) that petitioner's ADA argument is not properly presented in this Court is wrong. As this Court stated just last month, the "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National Railroad Passenger Corp.,* No. 93-1525 (Feb. 21, 1995) (quoting *Yee* v. *Escondido,* 112 S. Ct. 1522, 1532 (1992)). In *Lebron,* the "federal claim" was a violation of the Free Speech Clause; in *Yee*, it was a violation of the Takings Clause. Here, petitioner's claim -- which was indisputably raised in both lower courts -- is that his right to equal protection under the Due Process Clause of the Fifth Amendment has been violated. The contention that the ADA requires

heightened scrutiny is plainly an "argument in support of that claim."

In any case, a claim of some form of heightened scrutiny was expressly made by petitioner is both lower courts. In the district court, petitioner suggested in his *pro se* motion for summary judgment that "the discrimination under discussion should be examined under a standard of heightened scrutiny." C.A. App. 24A. And in the court of appeals, petitioner argued for a heightened "*Cleburne*" style of review and cited in support of that argument Congress' finding in the ADA, 42 U.S.C. § 12101(a)(7), that the disabled are a discrete and insular minority. Pet. C.A. Br. 13-15. Both lower courts, moreover, considered the question whether a standard of review "more exacting" than rational basis review should apply. Pet. App. 5a, 17a. Indeed, the government expressly acknowledged in the court of appeals that the heightened scrutiny argument was raised by petitioner. See Gov't C.A. Reply Br. 1 ("Plaintiff argues that the statute in this case is subject to a heightened standard of review."). Accordingly, that argument is properly presented in this Court.

Heller v. *Doe*, *supra*, is not to the contrary. In *Heller*, this Court refused to consider a "heightened scrutiny argument" pressed by respondents because they raised that argument "for the first time *in their merits brief* in this Court" and (it because) would have been "unfair" to allow respondents to raise the argument "at th[at] stage in the litigation." 113 S. Ct. at 2642 (emphasis added). Neither of those things can be said in this case. *Heller* thus does not control here.

2. The government concedes (Br. in Opp. 14 n.11) that the decision below conflicts with *Martin* v. *Voinovich*, *supra*, and does not dispute our submission that the decision below "is in square conflict" (Pet. 13) with *McGuire* v. *Switzer*, 734 F. Supp. 99 (S.D.N.Y. 1990). The government instead argues that this Court does not review conflicts between courts of appeals and district courts. Yet in *Travis* v. *United States*, 385 U.S.

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491 (1967), this Court noted that "[w]e granted certiorari in light of the important questions raised by petitioner, and the apparent conflict with the decision of the District Court for the Eastern District of New York in the *Laub* case, *supra*, which we affirm today." *Id.* at 492 (referring to *United States* v. *Laub,* 385 U.S. 475 (1967)). As in *Travis,* this case both raises important questions, see Pet. 6-15, and involves a conflict among the lower federal courts.[2]

In any event, the decision below also conflicts with the decisions of the United States Court of Appeals for the Ninth Circuit in *Pruitt* v. *Cheney,* 963 F.2d 1160, cert. denied, 113 S. Ct. 655 (1992); and *High Tech Gays* v. *Defense Indus. Security Clearance Office,* 895 F.2d 563 (1990) -- cases in which the Ninth Circuit "read *Cleburne* to require greater scrutiny than normally accorded under rational basis review." Br. in Opp. 8. The government's claim that these cases are no longer good law in the Ninth Circuit after *Heller* v. *Doe,* is simply incorrect. See, *e.g., Jackson* v. *Brigle,* 17 F.3d 280, 284 (9th Cir.), cert. denied, 115 S. Ct. 187 (1994); *Tovar* v. *U.S. Postal Service,* 3 F.3d 1271, 1278 (9th Cir. Aug. 31, 1993); *Cammermeyer* v. *Aspin,* 850 F. Supp. 910, 917 (W.D. Wash. 1994) ("The defendants' contention that *Pruitt*'s vitality has been extinguished by *Heller* is without merit") (citing *Jackson* v. *Brigle*).

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[2] Furthermore, the federal courts continue to struggle with the effect of the ADA upon the standard of review in equal protection cases. See *Kessler Inst. for Rehab., Inc.* v. *Mayor & Council of the Borough of Essex Fells,* No. 94-2361, 1995 WL 42916, *18 (D. N.J. Jan. 31, 1995) (noting that Congress has made a "finding that disabled persons are a 'discrete and insular minority,' 42 U.S.C. § 12101(a)(7), a phrase that has traditionally been associated with strict scrutiny" but following Third Circuit precedent calling for rational basis review of disability classifications); *Lee* v. *Oregon,* 869 F. Supp. 1491, 1497 (D. Ore. Dec. 27, 1994) (posing but not reaching the question: "Are persons who have a terminal disease disabled for purposes of the Americans With Disabilities Act and if so, does this means they are a suspect class?").

3. Although we believe that heightened scrutiny should be applied in this case, the government's preference for the blind over petitioner cannot survive even rational basis review. Tellingly, the government does not dispute that petitioner's condition is every bit as disabling as blindness; nor does it even attempt to argue that it is rational for the government to treat petitioner differently than the blind. Instead, the government argues that as-applied equal protection cases "do not require a court to consider whether a classification is rational in light of a particular individual's circumstances; it is the rationality of the distinction between categories that is important." Br. in Opp. 10 n.7.[3] This misconstrues the difference between facial and as-applied equal protection challenges.

Cleburne establishes that a statute can fail the rational basis test either on its face or in its specific application. The court of appeals in that case invalidated the city ordinance at issue both facially and as applied; this Court, however, ruled only on the latter ground. See *Cleburne,* 473 U.S. at 438, 447. The government thus errs in claiming that in an as-applied case it is only "the distinction between categories that is important" for the rationality of that distinction, the relevant issue in a facial challenge. In an as-applied case, as this Court has said, an equal protection violation is established by "show[ing] that the statute as applied to a particular [person] is without support in reason because the [person], although within the prohibited class, is so different from others of the class as to be without reason for the prohibition." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 153-54 (1938). Here, it is clear, and the government does not contend otherwise, that the preference for the blind "as applied to [petitioner in] particular" is "without support in reason." *Ibid.* That fact is enough to sustain petitioner's claim. The evident

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[3] The government acknowledges that petitioner's challenge was brought on an as-applied basis. Br. in Opp. i.

confusion of the government and court of appeals as to the proper mode of analysis in as-applied equal protection cases provides an additional reason for this Court to review the decision below.

But even if the government were correct in its focus upon "the distinction between categories," the preference for the blind would still be irrational. The government argues, as did the court of appeals, that Congress could reasonably conclude that the blind suffer greater financial hardship than do other disabled persons, emphasizing in particular the rate of unemployment among the blind. Br. in Opp. 10-11 & n.8. But the government does not dispute the evidence -- which has been accepted by the EEOC -- showing an identical unemployment rate for *all* disabled persons. See Pet. 19 (citing *inter alia* 56 Fed. Reg. 8578, 8581 (1991) (EEOC notice of proposed rulemaking under the ADA)). Congress cannot "reasonably conclude" that the blind face greater financial hardship than other disabled persons when, in fact, that conclusion is simply not true.

4. In this case, the government determined that, by earning more than $3,600 in 1986 notwithstanding his severe disability, petitioner: (1) forfeited over $6,000 in Social Security benefits in that year alone; (2) is henceforth ineligible for benefits (as he is no longer even "deemed" disabled); and (3) must return (per a demand made in 1995) over $34,000 in benefits received as long as eight years ago. None of this would have happened had petitioner's disability been blindness instead of arthrogryposis. The conclusion of the court of appeals that this mindless result is subject to nothing more than rational basis review -- and is in fact rational -- should be reviewed by this Court.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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